



After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the evidence presented in this case does not justify a modification of the original Award. The original Award based upon a ten percent (10%) permanent partial general body impairment should, therefore, remain in effect.

After the injury which is the subject of this claim, claimant returned to work for respondent at a wage comparable to his pre-injury wage. He continued to work for respondent doing maintenance of rural roads until September 16, 1991. On that date, respondent terminated claimant's employment. Although the claimant argues to the contrary, the Appeals Board finds that claimant's termination was for cause. Specifically, claimant was terminated because he left work early and because respondent had received complaints about the quality of the road maintenance work.

In support of modification of the original Award, claimant offers evidence of his termination and evidence from a vocational expert who gives opinions relating to the two prongs to be considered in determining work disability. Claimant acknowledges that neither his functional impairment nor his work restrictions have changed since the original Award. Claimant acknowledged he remained physically able to do the job he had been doing for respondent. Claimant bases the request for modification solely upon the termination from employment. In support, claimant cites Lee v. Boeing, Docket No. 157,744 (April 1994), where this Board held that an economic layoff may overcome the presumption of no work disability for employees who return to work at a comparable wage. K.S.A. 44-510e.

In the view of the Appeals Board, termination for cause often differs materially from economic layoff. These relate very differently to the central question of claimant's "ability." An employee laid off does not have the "ability" to perform the job from which he/she was laid off. As the presumption found in K.S.A. 44-510e itself implies, the term "ability" refers to more than physical ability, it also refers to practical economic realities. The Appeals Board has therefore considered an economic layoff to reopen questions about claimant's ability to perform other work and ability to earn a comparable wage, i.e., work disability.

An employee terminated for poor job performance unrelated to the injury may, on the other hand, reasonably be considered to have the "ability" to perform the job. The job loss may result from matters within the employee's control. The Kansas Court of Appeals recently ruled employees who refuse to accept reasonable employment are not entitled to benefit from the refusal by an award of work disability. Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994). Employees terminated for misconduct or poor performance invoke similar policy considerations.

In this case, the termination relates to job performance and the rule violations. Under these circumstances, the Appeals Board does not believe the termination should trigger modification of the original Award.

### **AWARD**

**WHEREFORE**, the Appeals Board finds that the Award on Review and Modification entered by Special Administrative Law Judge William F. Morrissey on May 19, 1994, should be, and the same is hereby, reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kelly Johnston, Wichita, KS  
Leigh C. Hudson, Fort Scott, KS  
Edwin Bideau III, Chanute, KS  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director